Filed 12/2/14 In re K.M. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re K.M., a Person Coming Under the Juvenile Court Law.	H040059 (Santa Clara County Super. Ct. No. JV39926A)
THE PEOPLE, Plaintiff and Respondent, v. K.M., Defendant and Appellant.	

On March 19, 2013, the Santa Clara County District Attorney filed a petition pursuant to Welfare and Institutions Code section 602, subdivision (a) in which the district attorney alleged that K.M. had committed a second degree burglary (Pen. Code, §§ 459, 460, subd. (b)).

Following a contested jurisdictional hearing, the court sustained the petition. On July 30, 2013, the court declared K.M. a ward of the court and placed him on probation at home on various terms and conditions. On August 19, 2013, K.M. filed a notice of appeal.

During the investigation in this case, K.M. confessed to the crime. On appeal, K.M. asserts that the juvenile court erred in denying his motion to suppress his confession

because it was not voluntary and was taken in violation of *Miranda*.[1] In addition, K.M. challenges one of the probation conditions that the court imposed, which we shall outline later. Finally, K.M. argues that the juvenile court failed to determine whether his offense was a misdemeanor or a felony. For reasons that follow, we modify the probation condition that K.M. challenges, but as so modified we affirm the juvenile court's dispositional orders.

Facts

On December 8, 2011, at approximately 9:00 p.m., Bara Singh, the owner of the Teriyaki Experience restaurant located in the food court at the Vallco Mall in Cupertino, began closing the restaurant for the evening. The restaurant had a front service counter area and a separate kitchen area located behind the service counter. At 9:30 p.m. Singh locked the restaurant's only door and secured the gate covering the service counter.

When Singh returned the next morning at approximately 11:15 a.m. he found papers on the floor of the front service area; he discovered that his safe was gone. The safe, which had been located under the cash register, contained $5000 cash and a checkbook; the safe was approximately two feet high, two feet wide, and two feet deep. The cash and the checkbook were never recovered; the checkbook was not used after the burglary.

Santa Clara County Sheriff's Deputy David Carroll investigated the burglary. When he arrived at the restaurant on December 9, 2011, he saw papers strewn across the floor and a pair of cabinet doors standing open; he did not see any signs of a forced entry. Singh told the deputy about the missing safe and the contents and informed the deputy that there was a surveillance video recording from the restaurant's three cameras. At the jurisdictional hearing, Deputy Carroll testified that he lifted fingerprints from the

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1 *Miranda v. Arizona* (1966) 384 U.S. 436.

restaurant, but he was not able to confirm whether K.M.'s prints were among them as he had not spoken to the fingerprint analyst.

Subsequently, the restaurant's parent company sent Deputy Carroll the surveillance video recording taken in the restaurant; the recording covered the period of time from 9:30 p.m. on December 8, 2011 through until 11:30 a.m. the following morning. From this video footage, Deputy Carroll created two shorter segments, which the prosecution offered as exhibit No. 1. One segment focused on the front counter and the other on the restaurant's kitchen. Portions of the video segments were played during Deputy Carroll's testimony at the jurisdictional hearing.[2]

About 45 seconds into the video that showed the counter area, two individuals walked back and forth in front of the counter. According to Deputy Carroll, he estimated that one individual appeared to be of unknown race, approximately five foot eight inches tall and 150 pounds; he was wearing a gray hooded sweatshirt and a red baseball cap. The other individual was "a black male" approximately five foot 10 inches tall and 180 pounds; he was wearing a dark jacket with white sleeves, dark pants, and a black hat.

At one point on the video recording, the person in the gray sweatshirt entered the restaurant on his hands and knees and searched the cabinets under the service counter. At this point, the lights in the mall appeared to be on, but the restaurant lights were off. Later in the video recording, both individuals were inside the restaurant on their hands and knees searching the cabinets under the service counter and along the back wall. The person in the gray sweatshirt was holding the front of his hood closed. Both individuals appeared to be wearing gloves as they removed several papers and then a safe from the cabinet under the cash register. According to Deputy Carroll, the safe appeared to be two feet high, two feet wide, and two feet deep.

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[2] At defense counsel's request exhibit No. 1 and exhibit No. 2—photographs taken from the surveillance video—were transmitted to this court.

By the end of the segment of video showing the counter area, the lights outside the restaurant were no longer on. The second video segment of the kitchen area of the restaurant showed a person using a flashlight to search around a dark kitchen.

Deputy Carroll investigated potential suspects, including former employees; he found that the former employees did not match the physical appearance of the individuals on the video recording. The deputy produced two still photographs from the surveillance video of the two individuals walking in front of the restaurant's service counter. The prosecution offered these photographs as exhibit No. 2 at the jurisdictional hearing. The deputy showed the photographs to Singh, but he was unable to identify either individual. In court, Singh thought that K.M. looked familiar, but he said that K.M. had never worked for him; he had never given him a key to the restaurant or permission to be in the restaurant.

Deputy Carroll showed the two photographs to John Escobedo, the director of security at Vallco Mall. Based on the way that one of the individuals wore his hat, Escobedo thought that the photograph resembled someone who had come to the mall, but he was not "a hundred percent sure." On December 19, 2011, while Escobedo was patrolling the mall, he saw a person that he thought could be one of the individuals from the photographs; he approached this person and asked him his name. The person said his name was "K[.]" and that he was a sophomore at Cupertino High School. Escobedo gave this information to Deputy Carroll.

On January 4, 2012, Deputy Carroll went to Cupertino High School at approximately 9:30 a.m. The deputy met with Jerry Sanchez, the school's conduct specialist. When the deputy showed Sanchez the photographs, Sanchez immediately recognized one suspect as K.M. based on the black and white jacket that the suspect was

wearing.[3] Sanchez could not identify the other suspect, but thought it might be a student named G.R. who spent time with K.M.

K.M. was asked to come to the school office and Sanchez escorted him into Sanchez's office. After K.M. was read his *Miranda* rights, he agreed to speak with the deputy and Sanchez. Initially, K.M. denied any involvement in the incident, but when he was shown the photographs taken from the video surveillance camera, K.M. said "that guy kinda looks like me." K.M. said that he had a black and white hat that looked the same as the hat in the photograph. According to the deputy, K.M. recognized the photograph as having been taken at the Vallco Mall food court. Eventually, K.M. admitted that the person in the photograph was him. However, initially K.M. said he did not know who the other suspect was. Deputy Carroll told K.M. about the surveillance video and what it showed him doing. K.M. continued to say he did not know anything about the incident; K.M. was defiant toward the officer and Sanchez. Then, K.M. appeared nervous and his hands were trembling. After being urged numerous times to tell the truth, K.M. confessed.

K.M. told the deputy that he entered the restaurant through a rear employee door with G.R., who had a key that allowed them to get in. K.M. denied that they took anything. However, later in the interview, again K.M. denied he was involved and claimed that he was making up everything. Sometime after this, Deputy Carroll ended the initial interview so that he could interview two other suspects. The deputy estimated

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[3] Sanchez testified at the jurisdictional hearing but his memory of the events was vague. He could not remember the photographs he was shown, but said that he remembered K.M. wearing clothing similar to that in one of the photographs. The clothing was how he identified K.M. when he was "ditching." In particular, he had seen K.M. wearing the black and white jacket. Sanchez did not remember recognizing the other suspect in the photograph or mentioning that he thought it could be G.R. Deputy Carroll was recalled and testified that when he showed Sanchez the surveillance photographs Sanchez immediately pointed to the person wearing the black jacket with white sleeves and the black hat and said "That's [K.M.]."

that these other interviews lasted 45 minutes to an hour. The deputy returned to interview K.M. again and this second interview of K.M. lasted about 30 minutes.

During the second interview, K.M. admitted that he and G.R. took the safe; and using his hands described the safe's approximate size as being two feet wide and two feet tall. K.M. said they took the safe outside to the mall parking lot and because it was locked tried to open it by banging it on the ground. However, they were unable to open the safe and so they discarded it in a dumpster that was in the mall parking lot.

K.M. testified on his own behalf. At the time of the jurisdictional hearing, K.M. was 18 years old, a senior at Cupertino High School, and was five foot eight inches tall and weighed 160 pounds. K.M. saw the surveillance video played in court. He denied that he had ever owned a dark hat with a white logo or a black jacket with white sleeves such as was worn by one of the suspects in the surveillance video from the restaurant. He admitted that when he applied for his driver's license when he was 16 years old, he told the DMV that he was five foot 10 inches tall and weighed 179 pounds.

K.M. said that in late 2011 and early 2012, he used to go to Vallco Mall three or four times a week. K.M. denied participating in the burglary at the restaurant on December 8, 2011. He denied taking the safe from the restaurant and denied that he was the person in the surveillance video. According to K.M., the only similarity between him and the person on the surveillance video was the skin color. The person on the video looked taller than he and looked as if he weighed 10 to 20 pounds more than he.

K.M. recalled going to the mall on December 19, 2011, and being approached by Escobedo. He said that Escobedo was wearing a security uniform and identified himself as the head of security. K.M. said he gave Escobedo his true name and told him where he went to high school. Escobedo did not tell him why he was asking him questions. K.M. thought that because Escobedo was head of security he wanted to know who was walking around the mall. K.M. said that he never thought about walking away or leaving and he did not feel threatened because he had done nothing wrong. However, K.M. said that he

had never encountered Escobedo before and knew of no reason why Escobedo would say anything about him that was not true.

K.M. said that on January 4, 2012, he was at school when he was told to go to the school's main office at approximately 9:30 a.m. When he got there, Sanchez escorted him into his office. Deputy Carroll was there; he was in full uniform. K.M. said he became nervous and anxious because he did not know why he was being called to the office; he knew nothing about what had happened at the restaurant.

According to K.M., Deputy Carroll showed him photographs of two people and asked him if he recognized them. K.M. said that one of them "kind of" looked like him because he had the same skin tone as him. K.M. denied that he told Deputy Carroll that the person in the other photograph was G.R. After showing him the photograph, the deputy told him that there had been a burglary at the restaurant. By that point, K.M. said he "kind of figured" that he was a suspect. The deputy and Sanchez asked him about his involvement in the burglary. K.M. said that he told them that it was the first time he had heard about it and that he had no idea that there had been a burglary at the mall. They kept repeating the questions as if they did not believe him. K.M. said he maintained that he was not involved. Despite him saying multiple times that he was not involved, the deputy and Sanchez told him to "stop lying, just tell the truth."

K.M. testified that he was anxious and nervous because Sanchez and Deputy Carroll kept asking him questions that he could not answer and they seemed to want him to tell them that he had done something that he had not done. They told him that if he did not tell the truth he would be taken downtown to juvenile hall. K.M. said that he had never been in trouble before and was scared. He asked if he could speak to his mother numerous times, but Deputy Carroll told him that he could not; this scared him. K.M. said that he did not know what to do, he could not telephone anyone and he had no contact with anyone outside the office. However, K.M. admitted that during the time he was in the office, he was never handcuffed, restrained, or hit.

At some point, Deputy Carroll and Sanchez left the room. Before they left, K.M. said that he admitted that he was the person in the photograph the deputy had shown him. He confessed because he believed that if he gave the deputy the information he wanted he would be allowed to leave and would not have to go to juvenile hall. After Deputy Carroll and Sanchez returned, they continued to ask him who else was involved. According to K.M., Sanchez sat down beside him and said, "why don't you just tell us it was [G.R.] because he already said that you were involved in this."

K.M. testified that he felt pressured by Deputy Carroll and Sanchez to give them the information they wanted because he "looked like the person in the photo." When asked why he told the deputy and Sanchez that G.R. was involved, K.M explained that was the information that was "said to [him] at the time." K.M. denied that he and G.R. were involved in the burglary; he just told the deputy and Sanchez what he thought they wanted to hear. He just went along with whatever details Deputy Carroll and Sanchez told him. For example, they asked him how he and G.R. got into the restaurant and suggested that maybe he had used a key; so he just said, "like, yeah, sure." K.M. said that at some point he told the deputy that he was just making up his statements about being involved in the burglary. However, Sanchez and the deputy did not believe him.

K.M. said that during the time that Deputy Carroll and Sanchez left the room, he was in the office alone with the door closed. His mind was "just racing" and he did not know what to do. He was not given any instruction about going back to class. K.M. said that when Deputy Carroll and Sanchez returned, he told them that he was not involved in the burglary. However, they did not believe him; they told him to stop lying and tell the truth. K.M. said that he then admitted that he did it because he "didn't want to get in trouble" and so he "just told them what they wanted to hear." K.M. said that he was able to describe the size of the safe because Deputy Carroll had already described the safe to him; he guessed how big it was. K.M. said that when he was asked what he did with the safe, at first he did not say anything. Then the deputy asked if he had dragged it outside,

K.M. said he told the deputy "Yes." When the deputy asked if they had picked up the safe and dropped it, K.M. said that he told the deputy yes. In essence the deputy was making suggestions and he just went along with whatever the deputy said. K.M. testified that he was interviewed for approximately two and a half hours.

K.M. testified that he was not involved in the burglary, but he told Deputy Carroll that he had been involved because of fear of getting in trouble, fear of going to juvenile hall, and fear of "being in an office being interrogated by the Cupertino sheriff." K.M. admitted that he had been questioned before about missing class and that he had never admitted to something he had not done.

When asked by the prosecutor if he had friends that worked at Vallco Mall, initially, K.M. denied that he did. Then, he admitted that he knew Tony Y., who worked, "[i]n a sense," at Sports Action in the mall. When asked what "in a sense" meant, K.M. said that he meant that Tony was not "officially employed" at the store before December 2011. K.M. admitted that he lied to the DMV about his height and weight when he filled out the form to get his driver's license.

Discussion

Denial of K.M.'s Motion to Suppress His Confession

Just before the prosecutor called Deputy Carroll to testify, K.M.'s counsel told the court that he would seek to voir dire the deputy in anticipation of his testimony regarding statements taken from K.M. Specifically, K.M.'s counsel told the court that wanted to voir dire "on issues of Miranda, foundation, and voluntariness . . . ."

During the voir dire of Deputy Carroll the following facts were established. Deputy Carroll said that he went to Cupertino High school at approximately 9:30 a.m. on January 4, 2012. After speaking to Sanchez, he asked to speak to K.M. As far as he knew, K.M. was in class at the time. Sanchez brought K.M. to the office. Deputy Carroll said he was in full uniform equipped with a firearm and baton; he did not pat-search K.M. After Sanchez brought K.M. into his office, the door to the office was closed. Deputy

Carroll said that aside from him, the only people in the office were Sanchez and K.M. K.M. was brought to the office at 9:51 a.m. and he remained there until he was released to his mother. Deputy Carroll said that he was at the school for a total of two and a half hours, but was not talking to K.M. the entire time.

Approximately 10 minutes after K.M. was brought to the office, Deputy Carroll read him his *Miranda* rights; he did not have K.M. sign a written waiver. K.M. said that he understood his rights and that he was willing to speak to Deputy Carroll. During the 10 minutes before Deputy Carroll read K.M. his rights, all they talked about was whether Vallco Mall was a place that K.M. went to.

Deputy Carroll said that he told K.M. he was a suspect in the burglary of Teriyaki Experience and that he needed to be truthful with him. According to Deputy Carroll, both he and Sanchez questioned K.M. Initially, K.M. denied participating in the burglary. They never told K.M. that if he admitted to the burglary, that he would not be taken to juvenile hall and would be released to his mother.

Deputy Carroll testified that after he told K.M. to tell the truth, K.M. changed his story about his involvement in the burglary. K.M. never said that he did not want to answer any questions and he never asked for an attorney.

Deputy Carroll said that at some point he left the office and spoke to other students, including G.R. G.R. told him that K.M. had committed the burglary. After speaking with G.R. he returned to the office and spoke with K.M. However, he did not recall telling K.M. that G.R. had implicated him in the burglary. Deputy Carroll said that when he left the office he did not tell K.M. that he had to remain there, but he acknowledged that in his mind K.M. was not able to leave until he finished conducting his investigation.

Deputy Carroll agreed with defense counsel that K.M. had asked to telephone his mother several times during the interview; and K.M. was told that he could not telephone

her at that time. Deputy Carroll noticed that K.M. appeared to be nervous—his hands were trembling. Deputy Carroll conceded that he did not offer K.M. any food or water.

K.M.'s counsel argued that K.M. was about 16 years old at the time of the interrogation; K.M. was removed from class and escorted to Sanchez's office where he was confronted with a uniformed officer as well as Sanchez, both authority figures. K.M. was in a closed room and was told he was a suspect in a burglary. Deputy Carroll talked to K.M. for 10 minutes before giving him a *Miranda* warning. K.M. was held in the room for about two hours without being offered any food or water. When K.M. asked to speak to his mother he was told that he could not. Counsel argued that for 45 minutes K.M. maintained that he was not involved, but was told to tell the truth repeatedly. Counsel asserted that under the totality of the circumstances, K.M. statements were taken in violation of *Miranda* and were not voluntary, thus violating K.M.'s right to due process.

Having considered all the testimony and the evidence on the issue of the *Miranda* waiver, the court found that K.M. was properly *Mirandized* and that he rendered a "lawful" waiver of those rights. Further, based on the totality of the circumstances K.M.'s statements were voluntarily given. Accordingly, the court denied K.M.'s motion to suppress his confession.

K.M. maintains that the juvenile court erred in denying his motion to suppress his confession because it was not voluntarily given. He argues that the confession violated his due process rights under the Fourteenth Amendment because his confession was "the result of sustained pressure and isolation." K.M. asserts that the juvenile court's error requires reversal under *Chapman v. California* (1967) 386 U.S. 18, 24, because the error was not harmless beyond a reasonable doubt.

"A suspect, having been advised of his *Miranda* rights, may waive them 'provided the waiver is made voluntarily, knowingly and intelligently.' [Citation.]" (*In re Norman H.* (1976) 64 Cal.App.3d 997, 1001.) "In general, a confession is the defendant's

declaration of his or her intentional participation in a criminal act. [Citations.] A confession constitutes an acknowledgement of guilt of the crime charged. [Citations.]" (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 208.)

However, " '[i]t long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. [Citations.] A statement is involuntary [citation] when, among other circumstances, it "was ' "extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight . . . ." ' " [Citations.] Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the "totality of [the] circumstances." [Citations.]' [Citation.]" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1402.)

" 'The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made.' " (*People v. Williams* (2010) 49 Cal.4th 405, 436.) "The test for determining whether a confession is voluntary is whether the questioned suspect's 'will was overborne at the time he confessed.' [Citation]" (*People v. Cruz* (2008) 44 Cal.4th 636, 669 (*Cruz*); see also *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.) " 'A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions.' [Citation.]" (*Cruz*, *supra*, at p. 669.) In determining whether a minor's confession is voluntary, we consider a number of factors, including the characteristics of the minor, including his or her maturity, education, physical condition, mental health, emotional state, and prior experience with the criminal justice system; and the circumstances of the questioning, including the location, length and continuity of the interrogation and any police coercion, threats, promises of leniency, lies or deception. (*People v. Boyette* (2002) 29 Cal.4th 381, 411; *In re Shawn D.*, *supra*, 20 Cal.App.4th at p. 209.) "Threats, promises, confinement, lack of food or sleep, are all likely to have a

more coercive effect on a child than on an adult." (*In re Aven S.* (1991) 1 Cal.App.4th 69, 75.)

" 'In assessing allegedly coercive police tactics, "[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." [Citation.]' [Citation.] [¶] A confession is not involuntary unless the coercive police conduct and the defendant's statement are causally related. [Citations.]" (*People v. Williams*, *supra*, 49 Cal.4th at p. 436.)

On appeal, we independently review a trial court's ruling on a motion to suppress a statement under *Miranda.* (*People v. Waidla* (2000) 22 Cal.4th 690, 730.) In so doing, however, "we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence." (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.) "[T]o the extent the facts conflict, we accept the version favorable to the People if supported by substantial evidence." (*People v. Weaver* (2001) 26 Cal.4th 876, 921.)

Here, the record establishes that K.M.'s interviews took place in a school office with which he was familiar, and not at the police station. There was no claim that the office was uncomfortable; K.M. was not handcuffed, restrained in any way, or searched. There is no evidence that either Deputy Carroll or Sanchez, whom K.M. knew, was abusive or impolite, or yelled at him. At the time of the interviews K.M. was 16 years old, which is not especially young. Although there is some evidence that K.M. has an "auditory processing" condition, his grades and school attendance were satisfactory.

The interviews took place during the morning of a regular school day; and the evidence showed that the two interviews took place between 9:50 a.m. and 12:00 p.m., slightly longer than two hours. However, there was a significant break between the two interviews. This was not an especially long time. Had K.M. not been in the school office, he would have been in class for at least that time. K.M. complains that he was not

given any food or water during that time, but there is no evidence that he asked for food or water and that his requests were denied. Again, K.M. was only in the office for just over two hours, not a long time to be without food and water.

Although K.M. was visibly upset while in the office, there was no evidence, nor were there any allegations made by K.M., that this was due to any conduct by Deputy Carroll or Sanchez. His reaction was similar to the reaction of any normal person, including an adult, being questioned by authority figures about possible involvement in a crime. There was no credible evidence that K.M. was threatened that if he did not confess he would be taken to juvenile hall. Nor was there any credible evidence that Deputy Carroll promised him that if he confessed he would be permitted to leave the office and would not be taken to juvenile hall. K.M.'s claim that the deputy told him that "if [he] didn't tell the truth [he] would be taken downtown and be taken to Juvenile hall" was simply not credible. Further, K.M.'s claim that he was told that if he admitted the burglary he would be allowed to leave the office and not be taken to juvenile hall, defies common sense. In short, according to K.M., if he admitted committing a serious crime, he believed that he would be free to leave the office, that he would be sent home and he would not be taken to juvenile hall, but if he denied that he committed a serious crime, he believed he would get into trouble and be taken to juvenile hall. Such logic is nonsensical. More importantly, Deputy Carroll, whom the juvenile court implicitly found to be credible, denied that K.M. was told that if he admitted the burglary he would be released to his mother and not be taken to juvenile hall.

K.M. complains that the officer "repeatedly confronted [him] insisting that 'he needed to tell the truth.' " Exhorting a suspect to tell the truth, unaccompanied by a threat or promise, is not coercive. (*People v. Tully* (2012) 54 Cal.4th 952, 993.) "It is also well established [that]exhortations directed to the suspect or witness to 'tell the truth' are not objectionable." (*People v. Lee* (2002) 95 Cal.App.4th 772, 785, fn. omitted.)

K.M. asserts that his confession resulted from sustained pressure causing his will to be overborne. K.M. appears to complain that he was coerced because the officer and Sanchez did not appear to believe him when he denied participating in the burglary. Even aggressive accusations of lying do not amount to coercive threats absent threats of punishment or promises of leniency. (See *In re Joe R.* (1980) 27 Cal.3d 496, 515 (*Joe R.*) [trial court had no duty to rule that loud, aggressive accusations of lying during interrogation of 17-year-old invalidated confession].) In *Joe R.*, the court held that a minor's confession was voluntary even though the police accused him of lying "loudly, emphatically, and with terse language (e.g., 'bullshit') . . . ." (*Id.* at p. 513.)

K.M. bases his involuntariness claim on interpretations of the evidence and questions of the credibility of witnesses that the juvenile court implicitly rejected. Since substantial evidence supports those factual determinations, we rely on them. Accordingly, we independently reject K.M.'s claim that his confession was involuntary and procured by police coercion. Other than the fact that two authority figures were doing the questioning, there was nothing remarkable about the interview or the conditions that raises the specter of coercion or that shows that K.M.'s will was overborne.

Alleged Violation of Miranda

In addition to his voluntariness argument, K.M. argues that his confession should have been suppressed because it was taken in violation of *Miranda v. Arizona*, *supra*, 384 U.S. 436. K.M. asserts that the juvenile court failed to adequately consider Deputy Carroll's denial of his repeated requests to call his mother.

We reiterate, "A suspect, having been advised of his *Miranda* rights, may waive them 'provided the waiver is made voluntarily, knowingly and intelligently.' [Citation.]" (*In re Norman H., supra*, 64 Cal.App.3d at p. 1001.) The prosecution bears the burden of establishing by a preponderance of the evidence that the relinquishment of rights was voluntary and that the suspect's waiver was made with full awareness of those rights and the consequences of the waiver. The validity of a *Miranda* waiver is a factual matter to

be decided by the trial judge based on the totality of the circumstances, including both the characteristics of the accused and the details of the interrogation. (*People v. Whitson* (1998) 17 Cal.4th 229, 246-247.) Relevant factors include the details of the interrogation, the minor's age, mental and physical condition at the time of the questioning, education, intelligence, experience, and familiarity with the police. (*In re Anthony J.* (1980) 107 Cal.App.3d 962, 972; *People v. Lara* (1967) 67 Cal.2d 365, 376, disapproved on other grounds in *People v. Mutch* (1971) 4 Cal.3d 389, 393.) On appeal, as a reviewing court we accept the lower court's resolution of disputed facts and its credibility evaluations if they are supported by substantial evidence. (*People v. Cortes* (1999) 71 Cal.App.4th 62, 70.) However, we independently determine whether, from the undisputed facts and those facts properly found by the trial court, the challenged statements were illegally obtained. (*People v. Whitson, supra,* at p. 248.)

"Determining the validity of a *Miranda* rights waiver requires 'an evaluation of the defendant's state of mind' [citation] and 'inquiry into all the circumstances surrounding the interrogation' [citation]. When a juvenile's waiver is at issue, consideration must be given to factors such as 'the juvenile's age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.' [Citations.]" (*People v. Nelson* (2012) 53 Cal.4th 367, 375.)

Here, the juvenile court determined that K.M. made a knowing, intelligent, and voluntary waiver of his *Miranda* rights. At the time of his interview K.M. was 16 years old and there is no evidence that he was not of average intelligence. K.M. does not dispute that Deputy Carroll read him his *Miranda* rights, nor does he dispute that he was willing to talk to the deputy. The evidence shows that Deputy Carroll read K.M. his *Miranda* rights, including that he had a right to remain silent and the right to an attorney and K.M. said that he understood and was willing to speak to the deputy. K.M. makes much of the fact that during the interview he exhibited signs of stress and that his hands

were trembling. However, at the time he gave his *Miranda* waiver there is no evidence that he was under this stress. It appears from the record that K.M.'s hands were trembling shortly before he changed his story and acknowledged his involvement in the burglary.

In essence, in asserting that his waiver was not knowing and voluntary, K.M. cites the same reasons as in his previous argument as the basis for his statement being involuntary. These reasons fail to establish that K.M.'s waiver was not knowing and voluntary. There is no evidence that K.M. did not understand the meaning of his *Miranda* waiver. That he was nervous is not surprising. As noted, most people when confronted by a deputy and accused of or implicated in a crime would be apprehensive. K.M.'s nervousness or apprehension does not negate his capacity to understand the nature of his rights and the consequences of waiving those rights.

While acknowledging that his repeated requests to speak to his mother are no longer viewed as a per se presumptive invocation of his Fifth Amendment rights,[4] K.M. argues that he demonstrated his youth and inexperience by repeatedly asking if he could speak to his mother. Notwithstanding his requests to talk to his mother, the evidence shows that after K.M. waived his *Miranda* rights he was open and responsive to questioning. K.M. was 16 years old at the time he waived his *Miranda* rights and, again,

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[4] The California Supreme Court in *People v. Nelson*, *supra*, 53 Cal.4th at page 381, noted that the court had "already recognized in the waiver context that a juvenile's request to speak with a parent is neither a per se nor a presumptive invocation of Fifth Amendment rights. [Citation.] There is an obvious reason for this: 'the parental role does not equate with the attorney's role in an interrogation by police.' [Citation.] Where, as here, a juvenile has made a valid waiver of his *Miranda* rights and has agreed to questioning, a postwaiver request for a parent is insufficient to halt questioning unless the circumstances are such that a reasonable officer would understand that the juvenile *is actually* invoking—as opposed to *might be* invoking—the right to counsel or silence. [Citation.]" Significantly, K.M. does not claim that he was actually invoking his right to remain silent or his right to an attorney by his request to speak to his mother.

there is no evidence that he was not of average intelligence. Further, there is no evidence that K.M. was crying or excessively upset or hysterical at the time he gave his waiver such that he would have been confused about what he was admitting to. The record, viewed most favorably to the People, supports the juvenile court's conclusion that K.M. knowingly and voluntarily waived his rights and made his confession.

Probation Condition

As one of the conditions of K.M.'s probation, the juvenile court ordered that K.M. "not be on or adjacent to any school campus unless enrolled or with prior administrative approval."

K.M. asserts that the phrase "adjacent to any school campus" is unconstitutionally overbroad and vague; and citing *People v. Barajas* (2011) 198 Cal.App.4th 748 (*Barajas*), K.M. requests that the probation condition be modified to include a 50-foot distance restriction and a knowledge requirement.

The Attorney General does "not object to a modification [that] would render the condition more specific." However, the Attorney General asserts that the "juvenile court would be in the best position to choose the specific distance appropriate for [K.M.]'s circumstances."

A court of appeal may review the constitutionality of a probation condition, even when it has not been challenged in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*).) Our review of such a question is de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

In *Barajas*, the defendant challenged as impermissibly vague and overbroad a probation condition similar to the one in the present case. The probation condition in *Barajas* stated: " 'You're not to be adjacent to any school campus during school hours unless you're enrolled in or with prior permission of the school administrator or probation officer.' " (*Barajas, supra*, 198 Cal.App.4th at p. 760.) This court agreed that

the probation condition was vague. We explained: "At a sufficient distance, most reasonable people would agree that items are no longer adjacent, but where to draw the line in the continuum from adjacent to distant is subject to the interpretation of every individual probation officer charged with enforcing this condition . . . . To avoid inviting arbitrary enforcement and to provide fair warning of what locations should be avoided, we conclude that the probation condition requires modification." (*Id*. at p. 761, fn. omitted.) The Attorney General in *Barajas* proposed modifying the probation condition to include the following language: " 'Do not knowingly be on or within 50 feet of a school campus . . . .' " (*Ibid*.) This court agreed that a 50-foot distance restriction would provide the defendant with "sufficient guidance" (*id*. at p. 762), and modified the condition to state: " 'You're not to knowingly be on or within 50 feet of any school campus during school hours unless you're enrolled in it or with prior permission of the school administrator or probation officer.' " (*Id*. at p. 763.) This court stated the following: "While accepting the Attorney General's concession in this case, we recognize that other modifications may equally solve the problem we perceive, such as a different measure of distance (e.g., '30 feet,' '20 yards'), a different measure of physical proximity (e.g., 'on' or 'one block away') or otherwise mapping restricted areas (e.g., 'the 1200 block of Main Street'). We do not intend to suggest that a 50-foot distance is a constitutional threshold." (*Id*. at p. 762, fn. 10.)

In this case, consistent with *Barajas*, we determine that the probation condition requires modification to prevent arbitrary enforcement and to provide fair warning to K.M. of locations to be avoided. (*Barajas*, *supra*, 198 Cal.App.4th at p. 761.) Further, because the Attorney General does not dispute that a knowledge requirement should be included, we will order the probation condition modified to include such a requirement.[5]

[5] K.M. argues that even if we make the condition more definite it is still constitutionally infirm because it impinges on his constitutional right to travel. Although (continued)

Alleged Failure to Determine Whether the Burglary Was a Felony or a Misdemeanor

K.M. points out that second degree burglary is a "wobbler" offense; that is, his burglary offense could be punished as either a felony or a misdemeanor.

Welfare and Institutions Code section 702 provides that in a juvenile proceeding if a "minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony."

In his opening brief, K.M. maintained that the juvenile court failed to exercise its discretion to designate the level of his offense and explicitly state its determination on the record.

However, in his reply brief, K.M. concedes that the record shows that the juvenile court was aware of, and exercised its discretion to determine the felony or misdemeanor nature of the wobbler. We accept that concession. When the juvenile court made its findings at the jurisdictional hearing, the court stated, "I'm sustaining [the] petition and finding [the] charge [second degree burglary] to be true and I'm sustaining that as a felony at this time." Further, the disposition order, which the juvenile court judge signed, states, "[a]ny charges which may be considered a misdemeanor or a felony for which the

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a probation condition may be overbroad when considered in light of all the facts, only those constitutional challenges presenting a pure question of law may be raised for the first time on appeal. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.) The Supreme Court has made it clear that not all constitutional defects in conditions of probation may be raised for the first time on appeal; some questions cannot be resolved without reference to the particular sentencing record developed in the trial court. (*Id*. at p. 889.) Such questions are subject to the traditional objection and forfeiture principles that encourage the parties to develop the record and allow the lower court to properly exercise its discretion. K.M.'s overbreadth argument is such a question since its resolution requires an assessment of the factual circumstances, including, among other things, the purposes the condition was designed to serve and the degree to which it actually restricts his ability to travel. Consequently, the forfeiture rule applies and we do not reach the merits of the challenge. (*Ibid*.)

court has not previously specified the level of the offense are now determined to be as follows." The court then checked the box for "felony." The record as a whole establishes that the juvenile court understood it had discretion to determine whether the burglary was a felony or a misdemeanor and that it deemed the offense to be a felony.

Disposition

The order of probation is modified to require that K.M. "not knowingly be on or within 50 feet of any school campus unless enrolled or with prior administrative approval." As so modified, the juvenile court's dispositional orders are affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.